

SERVICE DATE – LATE RELEASE MAY 5, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 389X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT
EXEMPTION—IN ROANOKE, VA.

Decided: May 5, 2017

Digest:¹ The Board is lifting a housekeeping stay it imposed and accepting a late-filed notice of intent to file an offer of financial assistance to purchase a rail line in an abandonment proceeding.

BACKGROUND

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon an approximately 0.5-mile line of railroad, between mileposts R 4.0 and R 4.5, in Roanoke, Va. Notice of the exemption was served and published in the Federal Register on March 23, 2017 (82 Fed. Reg. 14,938). The exemption was scheduled to become effective on April 22, 2017, unless stayed by the Board or unless a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(2) was filed by April 3, 2017.

On April 13, 2017, Thoroughbred Energy & Environmental Corporation (Thoroughbred) filed a notice of intent to file an OFA. In that notice, Thoroughbred also asks that the Board grant an extension of the deadline for filing OFAs adequate to allow time to review and analyze the material Thoroughbred has requested from NSR. On April 18, 2017, David L. Foster, the owner of Thoroughbred (see Notice of Intent at 1) also filed a letter noting concerns that abandonment of the line would require environmental remediation, would threaten future rail related prospects, and would disrupt service to a shipper (Associated Asphalt). On April 19, 2017, NSR and the City of Roanoke, Va., filed letters objecting to the notice of intent.² NSR

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² In its notice of intent, Thoroughbred states that the abandonment could have adverse effects on both the Virginia Museum of Transportation, which may provide tourist excursion service in the future, and its subsidiary, Roanoke Southern LLC, a Class III carrier, that has operating rights on a connecting line segment. (Notice of Intent 1-3.) On April 20, 2017, the
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argues that the notice should be rejected for various reasons, including that it is untimely. On April 21, 2017, Walker Machine & Foundry Corporation (Walker), an entity with property adjacent to the line at issue, filed a letter stating that: (1) it owns the underlying property and that NSR merely has an easement limited to railroad purposes; (2) the conveyance of the property to the City of Roanoke would affect a crossing agreement; and (3) the description of the right-of-way is incorrect.

One day before the exemption was scheduled to become effective, the Board issued a housekeeping stay to provide sufficient time for the Board to consider fully the issues raised. Norfolk S. Ry.—Aban. Exemption—in Roanoke, Va., AB 290 (Sub-No. 389X) (STB served Apr. 21, 2017). On April 24, 2017, both NSR and Thoroughbred submitted filings. NSR argues that the Walker letter raises issues of state property or contract law, which are irrelevant to the Board’s statutory criteria for licensing abandonments. In requesting that the Board lift the housekeeping stay, NSR references its earlier request that the Board reject as untimely Thoroughbred’s notice of intent to file an OFA.

Thoroughbred filed a letter asking for leave to late file, stating that its notice of intent was untimely because of a response to a March 30, 2017 email it sent to the Board’s Rail Customer and Public Assistance Program (RCPA),³ asking whether “the deadline for filing a Notice of Intent to file an OFA is April 3.” (Thoroughbred Letter 2, Apr. 24, 2017.) RCPA incorrectly replied that the deadline was April 22, 2017. (*Id.*) Thoroughbred argues that it was reasonable to rely on RCPA’s guidance, “especially in view of the fact that [Thoroughbred] specifically asked whether April 3 was the deadline and would have filed by that date if such deadline had been confirmed by RCPA.” (*Id.*) In addition to its explanation for late filing, Thoroughbred also asks that the Board look into issues regarding the proposed abandonment. Specifically, Thoroughbred mentions that the abandonment will threaten future rail service, that there is current rail service on the line, that it has environmental concerns, and that the National Trails System Act is being violated. (*Id.* at 3-4.)

On April 26, 2017, NSR filed a reply to Thoroughbred’s April 24, 2017 letter. NSR argues that Thoroughbred should not have relied upon the informal and indefinite information provided by RCPA given that the due date of the notice of intent was stated in the Board’s decision. NSR also argues that the other matters raised by Thoroughbred are untimely, incorrect, and/or irrelevant to whether the exemption should become effective.

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Virginia Museum of Transportation and Roanoke Southern LLC filed letters clarifying that, despite certain statements by Thoroughbred in its notice of intent, they do not support an OFA.

³ Among other things, RCPA assists Board stakeholders seeking guidance in complying with Board decisions and regulations. Matters brought to RCPA are handled informally by Board employees who are not part of the Board’s adjudicatory functions.

DISCUSSION AND CONCLUSIONS

Pursuant to 49 C.F.R. § 1152.27(c)(2), notices of intent to file an OFA are due no later than 10 days after the Board publishes a notice of an abandonment exemption in the Federal Register. The Board, nonetheless, may accept filings after the due date when good cause is shown. See Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894, 900 (1996). Indeed, when the railroad that has requested abandonment authority does not object to a late-filed notice of intent to file an OFA, the untimely filing is accepted as a routine matter by a Board employee with such delegated authority. Union Pac. R.R.—Aban. Exemption—in Osborne & Smith Ctys., Kan., AB 33 (Sub-No. 270X) (STB served Aug. 26, 2008) (accepting, via the Board’s Director of Proceedings, a late-filed notice of intent to file an OFA).

Typically, the Board does not accept late-filed notices of intent to file an OFA over the objection of the abandoning railroad, but the Board has done so under extenuating circumstances. Ill. Cent. R.R.—Aban. Exemption—in Champaign Cty., Ill., AB 43 (Sub-No. 189X) (STB served July 2, 2015). Here, Thoroughbred, a party that does not regularly participate in Board proceedings, at first correctly identified the deadline for filing the notice of intent. In an attempt to confirm that information by contacting RCPA, it was given an incorrect date. Although opinions and comments by RCPA employees do not bind the Board in its decision making, had Thoroughbred not relied on that information it would have likely filed on time. Thus, despite NSR’s objections, the Board will accept Thoroughbred’s notice of intent.⁴

The Board also notes that the consequences of accepting the late-filed notice of intent here are not particularly severe. Had Thoroughbred filed its notice of intent by April 3, 2017, the Board’s regulations at 49 C.F.R. § 1152.27(c)(2) would have automatically stayed the effective date of the abandonment exemption until May 2, 2017, and an offer would have been required to be filed and served by April 21, 2017. If a timely notice of intent, and subsequent OFA, had been filed, the earliest date the abandonment could have become effective was May 2, 2017. If the Board accepts the notice of intent now, the effective date of the abandonment will be delayed only until June 4, 2017.

NSR argues that the notice of intent is insufficient because it does not state whether Thoroughbred seeks to subsidize or purchase the line. (NSR Letter 2, Apr. 19, 2017.) However, it is clear that Thoroughbred seeks to purchase the line. (Thoroughbred Notice 2 (stating that “[o]fferor seeks to protect these nascent developments by acquiring . . . [the line].”))

NSR also argues that an OFA must be for the purpose of providing continued rail service, and that Thoroughbred has failed to demonstrate that the offer would be for that purpose. (NSR Letter 2, Apr. 19, 2017.) Specifically, NSR states that Thoroughbred’s plan to retain the line for

⁴ This decision does not alter the informal role that RCPA occupies at the agency. Guidance offered by RCPA employees is not binding, and might not be followed by the Board should a formal proceeding be initiated. The responsibility to verify the accuracy of information falls on the party itself.

an excursion train is not common carriage for OFA purposes. As to Thoroughbred's claim that the line should be retained in the rail system to serve Associated Asphalt, NSR points out that Associated Asphalt is already served by NSR on another portion of line that is not being abandoned. (NSR Reply 2, Apr. 26, 2017.) While the Board also has concerns about the viability of a potential OFA, NSR's arguments are premature, as issues regarding the merits of an OFA, including the likelihood of rail service, are generally not ripe until an OFA is filed. See Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1190X) et al., slip op. at 3 (STB served May 26, 2009).

Thus, after considering the extenuating circumstances and the fairly limited procedural impact of mitigating that error by accepting the notice of intent, the Board is persuaded that accepting the untimely notice of intent is the most equitable outcome. The Board will accept Thoroughbred's late-filed notice of intent, and lift the housekeeping stay. Accordingly, NSR will provide access to the documents described in 49 C.F.R. § 1152.27(d), a provision that is activated when a notice of intent to file an OFA is accepted. Walker has raised a question concerning whether NSR owns the relevant real estate in fee simple or as a rail easement. As the type of ownership impacts the calculation of the line's net liquidation value, NSR should also provide all information related to the nature of its property interest in the rail line.

With respect to filing an OFA, Thoroughbred's request for additional time to file an OFA is denied. Thoroughbred suggests that NSR will not be able to produce the information requested in the notice of intent to file an OFA in a timeframe that would give Thoroughbred sufficient opportunity to review and analyze what NSR provides. The Board's regulations, however, allow for an offeror to petition to toll the OFA submission deadline if an applicant (here, NSR) fails to promptly provide the required information. 49 C.F.R. § 1152.27(c)(2)(ii)(C). Therefore, Thoroughbred's OFA must be served and filed by May 25, 2017, and the effective date of the abandonment exemption will be June 4, 2017.

Lastly, to the extent that Thoroughbred raises additional matters in its April 24, 2017 letter (to which NSR responded), those issues are immaterial to the request to late file the notice of intent to file an OFA.

It is ordered:

1. The housekeeping stay is lifted.
2. Thoroughbred's request for leave to late file its notice of intent is granted and the late-filed notice of intent is accepted into the record.
3. Thoroughbred's OFA must be filed and served no later than by May 25, 2017. The effective date of the abandonment exemption is scheduled for June 4, 2017.
4. Thoroughbred's request for additional time to file an OFA is denied.

5. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.